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IN THE

Supreme Court of The United States

OCTOBER TERM 1973

No. 73-823

JAMES F. WALKER,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The sole question presented in this case is whether certain evidence, secured without a valid search warrant, was properly admitted into evidence at trial.

STATEMENT OF THE CASE

This was a criminal action brought by the State of Indiana against the Petitioner, James F. Walker, by affi-

davit. The affidavit charged the Petitioner with Professional Gambling, stating that on or about April 5, 1971, the Petitioner unlawfully and feloniously engaged in professional gambling. On March 22, 1972, the Court found the Petitioner guilty of professional gambling, and on April 7, 1972, the Court sentenced the Petitioner to the Indiana State Farm for a period of six (6) months, and fined him the sum of five hundred dollars ($500).

Facts relevant to the crime are that on April 5, 1971, Fort Wayne Detectives Lloyd Ellis, Ron Snyder, and Gene Towns, along with State Policeman Sam Platt, went to 1233 South Lafayette Street to execute a search warrant and two arrest warrants. The arrest warrants were for Robert L. Stewart and James Bates, Sr., charging both men with professional gambling violations.

The officers arrived at this address at approximately one-ten p.m. The building at this address faces Lafayette Street, with a door to the store portion on the north end of the building, and a door to a storeroom or utility room on the south end of the building. The building is used as a cigarette and cigar store with the business name of Stewart's Smoke Shop. Robert Stewart, for whom the police had an arrest warrant, was the operator of this business and the owner of the real estate.

When the police arrived at Stewart's Smoke Shop, they knew James Bates was in the south part of the building and that Robert Stewart was in the store portion. They entered the store portion of the Smoke Shop first. They advised Mr. Stewart that they had a warrant for his arrest and a search warrant. They read the warrants to him, advised him of his rights, and asked him for a key to the South portion of the Smoke Shop.

Detective Platt stayed with Mr. Stewart while Detectives Ellis and Snyder went to the south door of the Smoke Shop. Detective Ellis tried the key and it unlocked a lock, but the door failed to open, apparently because of an inside lock, so Detective Ellis knocked on the door. Bates opened the door, stepped back, and the detectives stepped in.

A partition near the door blocked visibility to the rear portion of the room, but Bates stepped back beyond the partition and Detective Ellis followed him. When Ellis passed the partition he was able to view the entire room. Upon looking around, he saw the Petitioner seated behind two tables. The tables were stacked with money, numbers slips, scratch pads and an adding machine, all in plain view (See pages 80-86 of the State Court Record).

Detective Ellis told Mr. Bates that he had a warrant for his arrest, but said nothing about a search warrant. He read the arrest warrant to Mr. Bates placing him under arrest and also arrested the Petitioner on a preliminary charge of professional gambling. A search incident to the Petitioner's arrest produced $250.00 and some change, along with two (2) numbers slips and some personal papers (See pp. 86-87 of the Record).

SUMMARY OF ARGUMENT

There was no error in admitting the questioned items into evidence. The articles taken from the tables were in plain view then the police entered, and the items taken from the Petitioner's person were discovered through a valid search incident to his lawful arrest.

ARGUMENT

The evidence to which Petitioner objects is of two separate categories. First, there is the evidence taken from the table tops, ie: the money, gambling slips, adding machine and scratch pads. Second, there is the evidence taken from the Petitioner's person, ie: the additional two hundred fifty dollars ($250), the numbers slips and the personal papers. It must be noted that these two groups of items were admissible into evidence for two separate reasons.

The items taken from the table tops were clearly admissible in evidence because the items were in plain view of the arresting officers. The State Court Record shows that after Bates let the officers in the door, he then stepped back into the rear portion of the room. Because the officers had a valid warrant for Bates' arrest, they followed him into the rear area. Once in that area, the officers could see the entire room, including the two tables and the items upon them. As this Court noted in *Harris v. United States,* 390 U.S. 234, 88 S.Ct. 992 (1968), such evidence is clearly admissible under such circumstances:

> It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced as evidence. *Ker v. State of California,* 374 U.S. 23, 42-43, 83 S.Ct. 1623, 1634, 1635, 10 L.Ed. 2d 726 (1963); *United States v. Lee,* 274 U.S. 559, 47 S.Ct. 746, 71 L.Ed. 1202 (1927); *Hester v. United States,* 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924).

Under the authority of these cases, it is clear that the items seized from the table tops were properly seized and

properly admitted in evidence. It is noteworthy that the Petitioner relies on *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022 (1973) as support for his contention that these items should not have been admitted in evidence. In *Coolidge,* however, the Court specifically cited *Harris, supra:*

> Finally, the "plain view" doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object. (403 U.S. at p. 467).

Thus, under the repeated rulings of this Court and under the very authority relied on by the Petitioner, the items seized from the tables were properly admitted in evidence.

Further it must be noted that even if the evidence seized from the tables had been the product of a search (which it clearly was not), the Petitioner would have had no right to question the validity of such a search. The right of one under the Constitution to be secure from unreasonable search and seizure is a personal right, and cannot be asserted by others than the one whose right is invaded. One who is not and does not claim to be owner or to have some rights to the possession of the place searched or of the thing seized will not be heard to complain that the search was unlawful. *Baskerville v. United States,* 227 F.2d 454 (1955); *McDonald v. United States,* 166 F.2d 957, 83 U.S. App. D. C. 96, reversed 335 U.S. 453 (1948); *Adler v. State,* 248 Ind. 193 (1967).

The items taken from the Petitioner's person were clearly admissible because they were the product of a search incident to an arrest. The officers advised the Petitioner that he was being placed under arrest on a preliminary charge of professional gambling, and then conducted a search of his person. The Petitioner contends that the

search was improper, citing *Chimel v. California,* 395 U.S. 752 (1969), as authority. It must be noted, however, that in *Chimel* this Court stated that such a search is reasonable and proper under such circumstances:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officers' safety might well be endangered and the arrest itself frustrated. (395 U.S. at p. 763).

Under the foregoing authority, it is unquestionably proper to search an arrested person, but if any doubt existed heretofore, such doubt most certainly had been dispelled by this Court's decisions in *United States v. Robinson* (Cause No. 72-926) and *Gustafson v. Florida* (Cause No. 71-1669), both decided on December 11, 1973. *Robinson* and *Gustafson* clearly state that a lawful arrest creates the authority to conduct a search of the person in the case of a custodial arrest:

> We have held today in *United States v. Robinson* that "it is the fact of the lawful arrest which establishes the authority to search, and . . . in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Ante,* at ——. Our decision in *Robinson* indicates that the limitations placed by *Terry v. Ohio, supra,* on protective searches conducted in an investigatory stop situation based on less than probable cause are not to be carried over to searches made incident to lawful custodial arrests. We stated in *Robinson:*
>
> > "The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order

> to take him into custody as it does on the need to preserve evidence on his person for later use at trial. *Agnello v. United States, supra; Abel v. United States,* 362 U.S. 217 (1960). The standards traditionally governing the search incident to lawful arrest are not, therefore, commuted to stricter *Terry* standards by the absence of probable fruits or further evidence of the particular crime for which the arrest is made." *Ante,* at ——.

Neither *Chimel v. California,* 395 U. S. 752 (1969), nor *Peters v. New York,* 392 U. S. 40 (1968), relied upon by petitioner, purported to limit the traditional authority of the arresting officer to conduct a full search of the person of an arrestee incident to a lawful custodial arrest. *United States v. Robinson, ante,* at ——. Indeed, as our decision in *Robinson* indicates, not only has this been established Fourth Amendment law since the decision in *Weeks v. United States,* 232 U. S. 383 (1914), but it was also the rule both at common law and in the early development of American law. *United States v. Robinson, ante,* at ——.

* * *

We hold therefore that upon arresting petitioner for the offense of driving his automobile without a valid operator's license, and taking him into custody, Smith was entitled to make a full search of petitioner's person incident to that lawful arrest. Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that Smith did not indicate any subjective fear of the petitioner or that he did not himself suspect that the petitioner was armed. Having in the course of his lawful search come upon the box of cigarettes, Smith was entitled to inspect it; and when his inspection revealed the homemade cigarettes which he believed to contain an unlawful substance, he was entitled to seize them as "fruits, instrumentalities or contraband" probative of criminal conduct. *Harris v. United States,* 331

U. S. 145, 154-155 (1947); *Warden v. Hayden*, 387 U. S. 294, 299, 307 (1967); *Adams v. Williams*, 407 U. S. 143, 149 (1972); *United States v. Robinson, ante*, at ——. The judgment of the Supreme Court of Florida is therefore affirmed.

(Specific volume and page citation of the foregoing passages are not yet available.)

Clearly, the Petitioner here, who makes no contention that his arrest was illegal, is without authority in contending that the search of his person was improper.

CONCLUSION

For the foregoing reasons, the State of Indiana urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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